

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KENNETH GREENE	:	CIVIL ACTION
	:	
v.	:	NO. 02-7283
	:	
COMMISSIONER OF SOCIAL SECURITY	:	

MEMORANDUM & ORDER

AND NOW, this 24th day of November, 2004, upon consideration of the defendant's motion to dismiss (Doc. No. 8); plaintiff's motion for partial summary judgment (Doc. No. 20); defendant's motion for summary judgment (Doc. No. 22); plaintiff's response to defendant's motion for summary judgment (Doc. No. 25); and having received no response to defendant's motion to dismiss¹, the court makes the following findings and conclusions:

A. Background and Procedural History

1. On October 23, 2002, purportedly pursuant to 42 U.S.C. § 405(g), 29 U.S.C. § 794 ("the Rehabilitation Act"), 28 U.S.C. § 1331 and 28 U.S.C. § 1361,² Kenneth A. Greene ("Greene") filed his complaint seeking judicial review of the Commissioner's final decision dated May 18, 1999.³ See (Compl. ¶ 1, Tr. 15-20). The final decision resulted from a January 7, 1999, hearing before an Administrative Law Judge ("ALJ"). (Tr. 21-37). In the decision, the ALJ considered Greene's entitlement to disability insurance benefits ("DIB") and disabled adult child's benefits and determined that Greene had received an overpayment of benefits. (Tr. 15-20).

¹ By order dated October 19, 2004 (Doc. No. 27), this court put plaintiff on notice that if he failed to file his response to defendant's motion to dismiss by November 18, 2004, the court would consider the motion without the benefit of his response. Moreover, plaintiff is well aware that under Local Rule of Civil Procedure 7.1(c), an unanswered motion to dismiss may be granted as uncontested. See (Doc. Nos. 11, 16 note 2, & 19).

² Mandamus relief under 28 U.S.C. § 1361 is not appropriate in this case as Greene has not exhausted all other avenues of relief available to him. Heckler v. Ringer, 466 U.S. 602, 616-617 (1984).

³ Although Greene filed this action *pro se*, he was an attorney, licenced to practice in Pennsylvania, until he was suspended from the practice of law by the Pennsylvania Supreme Court on November 22, 1997. Office of Disciplinary Counsel v. Anonymous, 157 D.B. 97 (1999).

2. In Count I of the Complaint, in addition to seeking review of the Commissioner's final decision, Greene also seeks review of his current entitlement to benefits and the reopening of applications he filed in 1994 which were denied. (Compl. ¶¶ 22-40).

3. In Count II of the Complaint, Greene alleges that the Commissioner violated the Rehabilitation Act based upon conduct allegedly performed while Greene worked for the Social Security Administration and by including a notation in his file that no action was to be taken on any of Greene's claims for benefits. (Compl. ¶¶ 46-82).

B. The Motion to Dismiss Count I in Part and Count II in Its Entirety, Filed By the Commissioner

1. In her motion to dismiss, the Commissioner claims that: (a) Greene may not have his current entitlement to benefits reviewed based on the applications he filed after the ALJ's May 18, 1999, decision because Greene has failed to exhaust his administrative remedies regarding these applications; (b) that there is no basis to reopen Greene's prior applications filed in 1994; and (c) that Greene's Rehabilitation Act claim was filed beyond the statute of limitations period. These three arguments will be addressed below. After considering all of the documents filed in this case, including Greene's motions and responses, all of the arguments raised in the documents, and all of the record evidence, I find that defendant's motion to dismiss is meritorious.

a. The Commissioner first argues that Greene has not exhausted his administrative remedies regarding the applications he filed after the ALJ's May 18, 1999, decision. According to Greene, he is currently receiving benefits pursuant to applications which he filed in December 1999 and which were adjudicated favorably on May 31, 2000, and June 15, 2000. (Compl. ¶¶ 28, 36, 37). Based on these awards, Greene wishes to review his current entitlement to benefits and to reopen prior decisions in which benefits were denied. Under 42 U.S.C. § 405(g), Greene is required to exhaust his administrative remedies regarding any claim arising under the Social Security Act by receiving a final decision from the Commissioner. 42 U.S.C. § 405(g); Weinberger v. Salfi, 422 U.S. 749, 757-758 (1975). Greene has not shown that he sought administrative review of these awards, and, thus, there is no final decision from the Commissioner. Sims v. Apfel, 530 U.S. 103, 106-107 (2000) (stating that "if a claimant fails to request review from the [Appeals] Council, there is no final decision and, as a result, no judicial review in most cases"). In this case, the only relevant final decision is the ALJ's May 18, 1999, decision. As mentioned previously, in that decision the ALJ considered Greene's entitlement to benefits at that time and determined that an overpayment of benefits had been made to Greene. (Tr. 15-20). The ALJ also considered certain attendant arguments raised by Greene that he was entitled to a second trial work period, that his last period of employment with the Social Security Administration should be treated as an unsuccessful work attempt, and that he had not engaged in substantial gainful activity. (Tr. 17-20). As a result, the only issues arising out of the Social Security Act which are ripe for review are those concerning Greene's entitlement to benefits during the relevant time period and the overpayment made to him as discussed in the ALJ's May

18, 1999, decision, along with the attendant arguments raised by Greene concerning these issues. All other issues raised by Greene arising out of the Social Security Act are not ripe because Greene has not received a final decision regarding those issues.⁴

b. The Commissioner next contends that Greene is not entitled to reopen his applications filed in 1994. The initial decision arising out of Greene's 1994 applications is dated June 22, 1995, more than seven years before Greene filed the instant complaint. (Tr. 173-176); see 20 C.F.R. § 404.988. Therefore, unless Greene can satisfy any of the categories for reopening an application listed in 20 C.F.R. § 404.988(c), his 1994 applications may not be reopened. After reviewing the regulations, I conclude that Greene has not satisfied his burden as he cannot meet any of the categories which authorize reopening. As a result, Greene's 1994 applications may not be reopened.

c. Last, the Commissioner argues that Greene's claim under the Rehabilitation Act in Count II of the complaint is barred by the applicable statute of limitations. The Rehabilitation Act is governed by a two-year statute of limitations. Barclay v. Amtrak, No. 03-2450, 2004 WL 2554567, *4 (E.D. Pa. 2004) (citing Saylor v. Ridge, 989 F. Supp. 680, 686 (E.D. Pa. 1998)). Here, Greene alleges that the following acts violated the Rehabilitation Act: (1) that shortly after March 15, 1993, the notation that no action was to be taken on Greene's claims was allegedly placed in his file; and (2) that the notation in his file affected his claims made from 1995 to 1998. (Compl. ¶¶ 17, 80, 81). However, Greene filed this action late in 2002. Therefore, all of the acts alleged to have violated the Rehabilitation Act are outside of the two year statute of limitations period, and, thus, Greene's claim is time barred.

C. The Cross-Motions for Summary Judgment Filed by the Parties Regarding the Remaining Issues in Count I of the Complaint

1. As a result of the foregoing, the only claims which survive defendant's motion to dismiss are those concerning Greene's entitlement to benefits and the overpayment made to him as discussed in the ALJ's May 18, 1999, decision. These issues are briefed in the parties' motions for summary judgment and will be addressed below. For the reasons that follow, I hold that the record contains substantial evidence to support the ALJ's findings of fact and conclusions of law regarding these issues.

a. Contrary to Greene's assertion, the ALJ did include in his decision a discussion of Greene's entitlement to benefits when he determined Greene's entitlement or lack thereof to DIB and disabled adult child's benefits under his father's and his own accounts. (Tr. 15 ¶1, 17 ¶2, 19 Finding 1). Similarly, Greene is incorrect that the ALJ failed to determine whether he was entitled to a second trial work period. (Tr. 17 ¶3). Moreover, after considering

⁴ Greene also raises a host of arguments in his motion for partial summary judgment and response to defendant's motion for summary judgment. However, for the same reason, the majority of those issues are not properly before me because they are not ripe. Those issues that are ripe will be addressed below.

the evidence, the ALJ's determinations regarding Greene's entitlement to benefits and his determinations that: (1) Greene was not entitled to a second trial work period; (2) that Greene's last period of employment with the Social Security Administration should not be treated as an unsuccessful work attempt; and (3) that Greene was engaging in substantial gainful activity starting from July 1991, are supported by substantial evidence. (Tr. 17 ¶3-18 ¶2, 102-105, 173-176, 291); see 20 C.F.R. § 404.1592, 20 C.F.R. § 404.1574, Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986) (stating that this court's role is to determine whether there is substantial evidence in the record to support the Commissioner's final decision). Therefore, Greene's arguments to the contrary must fail.

b. The Commissioner, in her motion for summary judgment, states that after Greene's January 7, 1999, hearing, it was determined that the overpayment made to Greene was the subject of bankruptcy proceedings. Therefore, the Commissioner advised Greene on February 16, 1999, that he was not required to pay back the overpayment. See (Doc. No. 18, Ex. A). As a result, this aspect of Greene's motion for summary judgment is moot.

Therefore, it is hereby **ORDERED** that:

1. The motion to dismiss filed by the Commissioner is **GRANTED** and Count I of the complaint is **DISMISSED IN PART** and Count II of the complaint is **DISMISSED IN ITS ENTIRETY**;
2. The motion for summary judgment filed by Kenneth A. Greene is **DENIED**;
3. The motion for summary judgment filed by the Commissioner is **GRANTED** and **JUDGMENT IS ENTERED IN FAVOR OF THE COMMISSIONER AND AGAINST KENNETH A. GREENE**; and
4. The Clerk of Courts is hereby directed to mark this case as **CLOSED**.

LOWELL A. REED, JR., S.J.